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No. 15-1111

IN THE
Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

DAVID J. ZIMMER
GOODWIN PROCTER LLP
Three Embarcadero Ctr.
24th Floor
San Francisco, CA 94111

WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
MATTHEW S. SHELDON
GOODWIN PROCTER LLP
901 New York Ave., N.W
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

Counsel for Petitioners

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RULE 29.6 STATEMENT

Bank of America, N.A. is a wholly-owned subsidiary of BANA Holding Corporation. BANA Holding Corporation is a wholly-owned subsidiary of BAC North America Holding Company. BAC North America Holding Company is a wholly-owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a wholly-owned subsidiary of Bank of America Corporation.

Countrywide Home Loans, Inc., is a wholly-owned subsidiary of Countrywide Financial Corporation. Countrywide Financial Corporation is a wholly-owned subsidiary of Bank of America Corporation.

Bank of America Corporation has no parent company, and no publicly traded company owns 10% or more of Bank of America Corporation's stock.

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REPLY BRIEF FOR PETITIONERS

The Eleventh Circuit interpreted the FHA to create a cause of action for anyone who suffers any foreseeable injury. On that view every foreclosure allegedly caused, even in part, by a discriminatory loan could trigger an FHA claim by neighbors, utility companies, local stores, and any other entity that suffers financial harm. Miami, several other municipalities, and their contingency-fee counsel are depending on that extraordinarily broad view to press their demands in more than a dozen cases against lenders across the country. *See* ABA Br. 8-9 & n.6. If the FHA contains any limitations at all, those cases fail on the pleadings. But on the Eleventh Circuit's view, those demands for hundreds of millions of dollars in tax revenue and municipal expenditures can head for discovery and potentially trials.

Congress limited the FHA by requiring plaintiffs to be "aggrieved" and to demonstrate proximate cause. The Eleventh Circuit read out those limitations, creating conflicts with decisions of this Court and other circuits and producing exactly the type of unbounded cause of action this Court called "absurd." Miami asks this Court to ignore the conflicts because, it says, the FHA is not subject to the same limitations as other statutes. But this Court has read the *same language* to have *the opposite effect* in a statute that—as Miami does not dispute—is materially identical. That is a conflict, and only this Court can resolve it.

Miami also asks that this Court forbear from review long enough for municipal plaintiffs to litigate to what they anticipate could be a nine- or ten-figure

payday. But as this Court emphasized last Term, the FHA contains important "safeguards" to prevent abuse by plaintiffs. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2523 (2015). The Eleventh Circuit has neutralized two key safeguards recognized by this Court and other circuits. The result is exactly the abuse this Court feared—unless this Court stops it, now.

I. This Court Should Resolve The Tension Between Its Prior Decisions Concerning When A Plaintiff Is "Aggrieved"

The Eleventh Circuit held that in the FHA, uniquely, the requirement that a plaintiff be "aggrieved" imposes no limitation at all, and Article III standing suffices. Miami contends that that holding is consistent with this Court's decisions, but the Eleventh Circuit itself recognized that Miami is wrong. The court of appeals saw that its holding could not be reconciled with this Court's reasoning in *Thompson*, but held that it had to follow contrary dicta in *Trafficante* until this Court itself "bur[ied]" that earlier passage. Pet. App. 28a. Only this Court can resolve the conflict within its own decisions; no further percolation can shed light on the issue. And this case is an ideal vehicle, because Miami is so clearly outside the zone of interests.

A. *Thompson* Settled The Meaning Of "Aggrieved" In A Way That Conflicts With The *Trafficante* Dicta On Which The Eleventh Circuit Relied

As the petition explained (at 18-21), any coherent reading of this Court's decisions compels the conclusion that FHA plaintiffs must fall within the zone of

interests. All statutes presumptively impose that limitation. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). The FHA employs the statutory term "aggrieved," whose "common usage" refers to the zone of interests. *Thompson v. North American Stainless, LP*, 562 U.S. 170, 177 (2011). And this Court has authoritatively construed the identical term in Title VII, a closely related statute, to require more than Article III standing. *Id.* Yet the Eleventh Circuit held that dicta in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), precludes the interpretation that this Court's other decisions require.

Miami does not dispute that a conflict between this Court's decisions requires this Court's intervention. Instead, Miami argues that *Thompson* does not conflict with either *Trafficante* or the decision below. But the decision below acknowledges the conflict. Pet. App. 27a-28a. Rightly so.

1. Miami repeatedly but erroneously asserts that the Eleventh Circuit applied a zone-of-interests analysis consistent with *Thompson*, and that it concluded that Miami fell within the FHA's zone of interests. Opp. 10, 15-16. In fact, the Eleventh Circuit repeated *four times* that, because of this Court's decisions in "*Trafficante*, *Gladstone*, and *Havens*," it did not need to consider whether Miami fell within the FHA's zone of interests: "the phrase 'aggrieved person' in the FHA extends as broadly as is constitutionally permissible under Article III." Pet. App. 27a-29a. As the Eleventh Circuit recognized, that holding depends entirely on rejecting *Thompson*'s interpretation of "aggrieved" in Title VII and following the *Trafficante* dicta instead. *Id.* And it is that hold-

ing that governs not only this case, but the nine other FHA lawsuits that Miami and four other municipal plaintiffs are currently pursuing against Bank of America and others within the Eleventh Circuit. It also emboldened others to file. ABA Br. 9 & n.8.

2. Miami argues that although *Trafficante* and *Thompson* interpret the term "aggrieved" differently, there is no conflict because *Thompson* interpreted "aggrieved" in Title VII, not the FHA. Opp. 12, 14. That simplistic argument completely ignores the reasons why "aggrieved" must have the same meaning in the two statutes. *See* Pet. 18-21. First, *Thompson* twice described how its interpretation of "aggrieved" in Title VII was consistent with the holdings (rather than excessively broad dicta) of earlier FHA cases; that point would have been irrelevant if "aggrieved" had a different meaning in each statute. Indeed, *Thompson* saw "no reason why [aggrieved'] in Title VII should be given a narrower meaning" than in the FHA. 562 U.S. at 177. Second, *Trafficante* interpreted the FHA by referring to cases interpreting Title VII. 409 U.S. at 209. Third, cross-citation between Title VII and FHA cases fits the rule that identical language presumptively has the same meaning across civil-rights statutes. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Fourth, *Thompson*'s reasoning that "absurd" consequences would follow from allowing any Title VII plaintiff with Article III standing to sue applies equally to the FHA. 562 U.S. at 176-177. Miami does not attempt to explain why Congress would have barred Miami from suing a company for lost property-tax revenue after the company's employee lost her home after an allegedly discriminatory firing, but allowed Miami to sue for lost property-tax revenue here. *See* Pet. 20. And,

fifth, *Lexmark* held that zone-of-interests analysis applies to "all statutorily created causes of action." 134 S. Ct. at 1388.

Miami does not acknowledge these arguments, provide any reasoned explanation for why the word "aggrieved" would have different meanings in Title VII and the FHA, or identify a single decision that gives such an explanation. Instead, Miami relies entirely on a single sentence in *Thompson* where this Court "acknowledge[d]" its prior statement in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), that "the term 'aggrieved' in [the FHA] reaches as far as Article III permits." Opp. 14; *Thompson*, 562 U.S. at 176. But far from "approving" of *Gladstone*'s statement as "correct," as Miami suggests, *Thompson* conspicuously cast doubt on that statement. *Thompson* described *Gladstone*'s statement as merely a "reiterat[ion]" of unnecessary dicta in *Trafficante*, and then emphasized that the statement was not even necessary to *Gladstone*'s more limited holding, which is "compatible with the 'zone of interests' limitation." 562 U.S. at 176.

3. Miami argues that *Thompson* is consistent with the proposition that a plaintiff need not have been the direct victim of discrimination. Opp. 13-14. That straw-man argument does not help Miami. The FHA's zone of interests can extend beyond direct victims of discrimination without extending to the full breadth of Article III. Indeed, *Thompson* held that while a Title VII plaintiff can be "aggrieved" without being the direct victim of discrimination, the word "aggrieved" still imposes limitations beyond Article III. 562 U.S. at 177. Thus, Bank of America acknowledged that both direct victims of discrimina-

tion *and those litigating an interest in the benefits of an integrated community* fall within the FHA's zone of interests. Pet. 24. But that is a far cry from the Eleventh Circuit's and Miami's position: that a foreclosure allegedly caused by a discriminatory loan creates an FHA cause of action for a neighbor, utility company, local store, or anyone else financially harmed by the foreclosure.

B. The Meaning Of "Aggrieved Person" Is Outcome-Determinative Because Miami Plainly Is Outside The FHA's Zone Of Interests

This case is an ideal vehicle because Miami is so plainly outside the FHA's zone of interests. Unsurprisingly, the only courts to examine the FHA's zone of interests and apply it to municipal FHA cases—the district court here and the decision Miami cites, *see* Opp. 8 (citing *County of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909 (N.D. Ill. 2015) (Feinerman, J.))—have concluded that municipal claims for tax revenue and the like do not qualify.

Miami's argument (at 11-12) that Congress intended the FHA's zone of interests to be as broad as Article III mischaracterizes this Court's decisions and conflicts with *Thompson*. Miami relies principally on a case from 1968 that did not involve the FHA (which was then brand-new). *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416 n.21 (1968) (FHA was "markedly different" from the statute at issue). Miami quotes statements by counsel during oral argument as if they were holdings of this Court. Opp. 11-12 (quoting *Jones*, 392 U.S. at 416 n.19). And even accepting that Congress intended the FHA's zone of

interests to be *broad*, Miami points to nothing suggesting that Congress intended the FHA's zone of interests to be *as broad as Article III*. Such a conclusion would conflict with *Thompson*, as it would lead to inconsistent interpretations of the word "aggrieved" and produce precisely the "absurd consequences" *Thompson* sought to avoid.

Miami notes (at 13 & n.1) that the Village of Bellwood in *Gladstone* lost property-tax revenue from realtors' steering practices. But as the petition explained (at 24 n.5), Bellwood's primary complaint was not lost tax revenue, but the risk that realtors' actions would "replac[e] what is presently an integrated neighborhood with a segregated one." 441 U.S. at 110. *Gladstone* never suggested that Bellwood could sue absent its interest in preventing segregation. While Miami notes (at 14) that it alleged a general interest in maintaining a diverse community, the district court already held, in denying reconsideration, that Miami's conclusory allegations "fall[] far short of alleging facts sufficient to demonstrate that Defendants' lending practices adversely affected the racial diversity or integration of the City." Pet. App. 82a n.1. And under the Eleventh Circuit's decision, Miami does not have to allege *any* impact on integration.

C. Further Lower-Court Percolation Would Shed No Light On A Conflict Between This Court's Own Decisions

The conflict between this Court's decisions needs resolution *and* is preventing meaningful percolation. As the petition explained (at 21-24), the vast majority of lower courts have concluded, like the Eleventh

Circuit, that they are bound by *Trafficante* despite recognizing that *Trafficante* is incompatible with *Thompson*'s reasoning. *E.g.*, *County of Cook v. HSBC N. Am. Holdings Inc.*, 136 F. Supp. 3d 952, 964 (N.D. Ill. 2015). Not one of these cases has provided a reasoned explanation for why a person outside the statute's zone of interests is "aggrieved" under the FHA but not Title VII. Indeed, the perception of binding precedent frustrates percolation by stifling interlocutory appeals. Pet. 23. Time will not aid this Court in interpreting the word "aggrieved" in the FHA. Instead, waiting to provide an authoritative answer will simply allow municipal FHA cases to proceed through large-scale, burdensome discovery—increasing the plaintiffs' settlement leverage. *See* Chamber Br. 14-16; ABA Br. 12.

II. This Court Should Resolve The Split Concerning Whether Any "Foreseeable" Injury Satisfies Proximate Cause, No Matter How Attenuated The Connection To The Defendant

Each time this Court has interpreted the proximate-cause requirement for a federal cause of action, it has held that the plaintiff must show a sufficiently direct connection between the defendant's conduct and the plaintiff's injury. Pet. 27-28; *Lexmark*, 134 S. Ct. at 1391; *Holmes v. SIPC*, 503 U.S. 258, 268-274 (1992); *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 540-41 (1983). Courts of appeals have similarly required some degree of directness. Pet. 28-29. The Eleventh Circuit's decision below conflicts with these decisions; in fact, it is the only case holding that a plaintiff can satisfy a federal statute's proximate-cause

requirement merely by showing foreseeability, no matter how attenuated the connection between the defendant's conduct and the plaintiff's injury.

Once again, Miami relies (at 16-17, 22) on the notion that decisions interpreting other federal statutes are *per se* irrelevant. But Miami ignores this Court's decisions on how Congress presumptively understands proximate cause. Cases like *Lexmark*, *Holmes*, and *Associated General Contractors* were not parsing the text and history of specific statutes. Pet. 32-33. Rather, those cases were based on the tort principle requiring a direct connection between defendant's conduct and plaintiff's injury, a background principle against which Congress is presumed to legislate. *E.g.*, *Holmes*, 503 U.S. at 267-69. This Court has already held that the FHA, like RICO, the antitrust laws, and the Lanham Act, incorporates "a legal background of ordinary tort-related ... rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). The conflict thus affects not a single federal statute, but the background principles uniformly used to interpret *many* federal statutes.

Miami misunderstands *Lexmark*'s statement that the proximate-cause inquiry can differ across statutes. Opp. 21. While *Lexmark* acknowledged that the *degree* of permissible attenuation between defendant's conduct and plaintiff's injury may vary by statute, it never even hinted that the degree of attenuation can be *completely irrelevant*, as the Eleventh Circuit held. To the contrary, *Lexmark* held that even though proximate cause under the Lanham Act permits *some* "intervening link[s]" in the causal chain, the directness requirement still imposes important limits: While a "competitor who is forced out

of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely" incidental harm. 134 S. Ct. at 1391, 1394. Eventually the connection between defendant's conduct and plaintiff's injury becomes too remote to support a claim.

Miami fails to individually distinguish the court of appeals cases that conflict with the Eleventh Circuit's decision. Miami incorrectly claims (at 18) that *Aransas Project v. Shaw* did not require directness, even though the Fifth Circuit reversed the district court for "ignor[ing]" directness and "nowhere mention[ing] remoteness [or] attenuation." 775 F.3d 641, 658 (5th Cir. 2014). Miami notes (at 17-19) that the Second and Ninth Circuit decisions held that the plaintiffs satisfied the proximate-cause requirement. But before reaching that conclusion, each court first held that the plaintiff's injuries were not too "remotely or insignificantly related to" defendant's conduct. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003); *Ray Charles Foundation v. Robinson*, 795 F.3d 1109, 1124 (9th Cir. 2015) (finding "no remoteness"). Although Miami suggests (at 19, 21) that a "remoteness question" is somehow different than "a directness one," it never explains what difference there could possibly be. Barring claims that are too remote is another way of requiring that claims be sufficiently direct. The Eleventh Circuit, by contrast, held that no remoteness or directness inquiry was necessary at all.

Miami does not identify *any* other appellate decision that formulates proximate cause broadly enough

to encompass its alleged causal chain—discriminatory loans caused some defaults, which caused some foreclosures, which caused some loss in property value, which caused some loss in taxes and increased municipal expenses. This Court should grant certiorari to resolve the circuit split the Eleventh Circuit's outlier decision has created.

III. The Time To Decide These Dispositive Threshold Questions Is Now

The Eleventh Circuit's decision stripped away both key limitations on the FHA cause of action and allows this case, and others like it, to proceed to costly and complex discovery. Yet Miami insists that this Court must leave that decision in place, and wait until after trial and final judgment to decide threshold questions about whether this case belongs in court at all. Not surprisingly, this Court has never followed such a hands-off approach to basic statutory limits that should be applied at the outset, not the end. In fact, this Court has *often* reviewed appellate decisions in the identical posture—decisions holding that a zone-of-interests or proximate-cause limitation did not bar the claim and remanding for further litigation. *See, e.g.*, *Lexmark*, 134 S. Ct. at 1385; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204 (2012); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 645 (2008). Prompt review is especially appropriate given that, as *amici* explain (Chamber Br. 5-9, 12-14; ABA Br. 7-12), the questions presented are highly significant to the entire lending industry. Among other things, these threshold questions are likely outcome-determinative in each of the multimillion- or billion-dollar municipal FHA suits now pending.

Miami cannot avoid review of these threshold issues—and force Bank of America and other lenders litigating in the Eleventh Circuit into years of discovery—by arguing that it may ultimately lose the case for reasons unrelated to the questions presented. Opp. 5. Even if the district court dismisses Miami's latest complaint, the case will not become moot. Miami states (at 7) that it would appeal any dismissal, keeping the case alive more than long enough for this Court to resolve it.

Miami relies on an inapposite mootness rule specific to preliminary-injunction appeals. Opp. 7. Such appeals become moot when final judgment is entered, *no matter who wins* and irrespective of appeal. *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 588-89 (1926). By contrast, the threshold questions presented here will survive unless and until Bank of America wins a final, *unappealable* victory on other grounds. Unless Miami willingly drops its case, that will not happen before this Court can act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID J. ZIMMER
GOODWIN PROCTER LLP
Three Embarcadero Ctr.
24th Floor
San Francisco, CA 94111

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WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
MATTHEW S. SHELDON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

Counsel for Petitioners